In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2009

JOSEPH ROLAND ROGER SAVARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues are whether the indictment was sufficient and whether the elements of the crime were proved.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of transporting an alien illegally present within the country, in violation of 8 U.S.C. 1324. He was sentenced to a term of one year's imprisonment; all but three months were suspended and petitioner was placed on probation for three years. The court of appeals affirmed *per curiam* (Pet. App).

Petitioner was originally indicted and tried upon three counts charging transportation of aliens illegally present in the country. A directed verdict was granted on count two, while the jury acquitted petitioner on count three and adjudged him guilty of count one. The first count of the indictment read as follows:

On or about November 28, 1972, in Orange County, Florida, in the Middle District of Florida,

JOSEPH ROLAND ROGER SAVARD

did willfully and knowingly transport and move by means of an automobile from Plattsburg, New York, to Orange County, Florida, in the Middle District of Florida, Jean Marc Levesque, an alien not duly admitted by an Immigration Officer and not lawfully entitled to enter and reside within the United States, and in order to further such violation, and JOSEPH ROLAND ROGER SAVARD then knew that Jean Marc Levesque was in the United States in violation of law, and JOSEPH ROLAND ROGER SAVARD then knew and had reasonable grounds to believe that Jean Marc Levesque's last entry into the United States occurred less than three years prior to the said November 28, 1972; all in violation of Title 8, United States Code, Section 1324.

Subsequently, the trial court ordered a new trial for count one on the ground that the government had not timely complied with a court order requiring a bill of particulars disclosing the specific statutory basis for the allegation in the indictment that the alien was in the country in violation of law. A second trial was commenced on the same indictment at which time the government indicated that the alien involved had entered the country specifically in violation of 8 U.S.C. 1325 by means of "willful, false and misleading statements made at the border" (Tr. 6). Following this second trial, the jury found petitioner guilty.

The evidence showed that petitioner had known Jean Marc Levesque when the two lived in Canada; Levesque, as petitioner knew, was a Canadian citizen (Tr. 28-29, 62-63). At the time of the act alleged, petitioner was in charge of a picking crew for a Florida fruit company and had told Levesque that he could secure employment for him harvesting fruit (Tr. 31). Accordingly, a plan was devised to effect Levesque's entry into the United States and transportation to Florida. Petitioner, who was immigrating to the United States, carried Levesque's luggage in his car across the border while Levesque and another man drove across the border separately, telling border personnel that they were merely going to Plattsburg, New York, for the afternoon (Tr. 34-40). After crossing the border Levesque got into petitioner's car and the two proceeded southward into Florida. Testifying on his own behalf, petitioner admitted participating in this plan and admitted his knowledge at the time that Levesque's entry was illegal (Tr. 170-174).

1. Petitioner argues that the indictment insufficiently apprised him of the charge against him in that the phrase "in violation of law" (referring to the alien's entrance into the United States) was too vague to be adequately informtive. It has long been established, however, that an indictment is sufficient if it contains the elements of the offense charged and thus informs the defendant of what he must be prepared to meet and is sufficiently precise so as to protect him against double jeopardy. See *Russell* v. *United States*, 369 U.S. 749, 763-764, and cases cited. The indictment in the instant case met that standard. Specifically, it charged that petitioner transported an alien not duly admitted by an imigration officer, from Plattsburg, New York to Orange County, Florida, and that petitioner knew the alien was in the country in violation of law, *i.e.* that he had not been duly admitted by an immigration officer,

and knew that the alien's last entry occurred less than three years prior to the act charged. It both apprised petitioner of the offense with which he was being tried and protected him against double jeopardy.

In *Keck* v. *United States*, 172 U.S. 434, cited by petitioner, this Court held insufficient an indictment charging that the defendant " 'did * * * unlawfully import * * *' diamonds of a stated value 'contrary to law and the provisions of the act of Congress in such cases made and provided * * * ' " (*id.* at 437). The rationale for this holding was that

> [t]he words "'contrary to law'" * * * clearly relate to legal provisions not found * * * [in the statute] itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, "'import and bring into the United States," did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. [*Id.* at 437.]

Here, by contrast, while the words "in violation of law" also relate to legal provisions not found within Section 1324, other portions of the indictment delineate the acts considered violative of the laws with respect to alien entry, *i.e.*, the charge that Levesque had not been "duly admitted by an Immigration Officer".[1]

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[1]The indictment in *Steiner* v. *United States*, 229 F. 2d 745 (C.A. 9), certiorari denied *sub nom. Hadzima* v. *United States*, 351 U.S. 953, cited by petitioner in suggesting a conflict among the circuits, suffered the same defect as the *Keck* indictment and is thus similarly distinguishable. In *Steiner*, the indictment charged the defendants had "fraudulently and knowingly imported into the United States certain merchandise, namely, a number of psittacine birds, contrary to law" (229 F. 2d at 747). There again, as the *Steiner* court observed, there was no indication as to "in what respect such importation was contrary to such law." *Id.* at 748.

Thus, the indictment was sufficient to apprise petitioner of the charges he would be required to meet and to protect him against future prosecutions for the same offense. As to his argument that "[i]t was a complete surprise that Levesque's offense turned out to be § 1325" (Pet. 8), it suffices to note that the trial court, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, directed the government to include within its bill of particulars the specific statue (18 U.S.C. 1325) which it claimed Levesque had violated on securing entry into the country. While, of course, a bill of particulars cannot save an invalid indictment (*Russell* v. *United States*, *supra*, 369 U.S. at 770), a sufficient indictment, such as here, may be more precisely detailed by a bill of particulars in order to avoid any chance of uncertainty on the part of the defendant. *United States* v. *Martinez*, 466 F. 2d 679, 686 (C.A. 5); *United States* v. *Addonizio*, 451 F. 2d 49, 64 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Branan*, 457 F. 2d 1062, 1065 (C.A. 6).

2. Petitioner contends that the courts below should have held that the illegal entry was complete when Levesque crossed the border, and, consequently that petitioner, who picked him up five miles below the border, could not have been guilty of transporting him "in order to further such violation," as stated in the indictment. Petitioner suggests that the contrary holding of the court below on this point is in conflict with decisions in other courts of appeals. But petitioner admits (Pet. 10) that the only even "remotely analogous" case is *United States* v. *Mallides*, 339 F. Supp. 1 (S.D. Cal.), reversed on other grounds, 473 F. 2d 859 (C.A. 9). That case correctly noted, however (339 F. Supp. at 4), that one who participates in a plan illegally securing the entry of an alien into the country (as did petitioner) has furthered the scheme even if he transports

the alien only after he has entered this country. The present case, therefore, is not in conflict with decisions in other circuits. Moreover, that the court below was correct is shown by the wording of Section 1324, which proscribes the transportation of any alien illegally within the country *within three years of that entry*, manifesting a congressional intent to penalize the knowing transportation of such an alien even well after his initial crossing of the national border.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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